On these facts, the trial Judge held there was a trespass and a breach of contract as alleged and awarded 17,500 dollars as damages. Upon appeal this judgment was reversed and it was held that there was no action wrongly committed or breach of contract and that accordingly no damages were recoverable. The question of the amount of damage, if any, was not investigated upon appeal.

Before their Lordships a considerable number of questions were debated, some of them questions of difficulty and importance. Such questions were: Was there a contract between the parties and in the absence of a grant had the appellant any rights which could be enforced by action? Did the procedure laid down in Part VII of the Land Act apply as a matter of obligation to land which was not the subject of a grant? What was the true construction of the provisions of Part VII as to the conditions preliminary to sale of the land and in particular must resort be had to all and every piece of movable property before resort to the land or was it sufficient if a *bona fide* exercise of discretion in this matter was exercised by the Collector? Their Lordships think it both unnecessary and undesirable to express any opinion on any of these points — all the more because with regard to some of them the information and evidence available is far from complete. This case in the opinion of their Lordships can and should be decided on a much simpler ground. This is simply a common law action seeking damages for breach of an alleged contract, and nothing else. No plaintiff can maintain such an action unless he can aver and prove that he has performed or has at all times been ready to perform his part of the contract. This the appellant, owing to his serious default in payment of rent, was incapable of doing.

In these circumstances their Lordships are of opinion that the appellant was not entitled to succeed in his action and that the Court of Appeal was correct in ordering that the claim should be dismissed.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant, by leave of His Majesty in Council, entered and prosecuted this appeal *in forma pauperis* and there will accordingly be no order as to the costs of the appeal.

Appeal dismissed.

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[191] STRAITS SETTLEMENTS REPORTS

PUBLISHED BY AUTHORITY

IN THE MATTER OF THREE ADVOCATES AND SOLICITORS

[O.C.J. (Huggard C.J. and Terrell J.) May 9, 1935]

[Singapore Originating Motion No. 10 of 1935]

Advocates and Solicitors — Striking off the roll — Application by motion made ex parte — Validity of order made thereon — Affidavits — Whether filing after order applied for amounts to an irregularity — Advocates and Solicitors Ordinance, No. 32 of 1934, s.26; Civil Procedure Rules, 1934, O.49, r.4; O.36, r.19.

Although section 26 of the Advocates and Solicitors Ordinance, 1934, does not specifically provide that applications for an order to show cause thereunder shall be made *ex parte*, such applications nevertheless fall within Order 49, rule 4 of the Civil Procedure Rules, 1934, and notice thereof need not be given to the parties to be affected thereby.

Provided that affidavits setting forth facts upon which an *ex parte* order is sought are filed at the same time as the motion itself, there can be no objection to further supplementary affidavits being made and filed prior to the hearing of the motion. *In re King & Co.'s Trade Mark,* (1892) 2 Ch. 462 applied.

Motions, filed on behalf of the respondents to the above originating motion, to set aside for irregularity an *ex parte* order made under section 26 of the Advocates and Solicitors Ordinance dismissed.

ORIGINATING MOTION.

Withers-Payne, Koek and *Cobbett* each representing one of the respondents.

Adrian Clark (Solicitor-General) for the Attorney-General.

Cur. Adv. Vult.

The judgment of the Court (Huggard C.J. and Terrell J.) was as follows:—

Huggard C.J. and **Terrell J.**: On the 8th April, 1935, this Court made an order under section 26 of the Advocates and Solicitors Ordinance, 1934, calling upon three advocates and solicitors (in this judgment referred to as "the respondents") to show cause why each of them should not be struck off the roll or suspended from practice or censured on the ground that he had been guilty of improper conduct in the discharge of his professional duty. This order was made *ex parte.*

On the 11th April, 1935, motions were filed on behalf of each of the respondents for an order that the order of the 8th April be set aside for irregularity.

The first ground upon which it is sought to set aside the order in question is, in effect, that the order should not have been made *ex parte* and that notice of the original motion should have been served on each of the respondents in the manner prescribed for service of writs of summons.

In support of the respondents' contention on this point reference was made to the law governing the procedure to be adopted on applications of this nature as it existed prior to the 1st January, 1935. Prior to that date provision was made for such applications in section 92 of Ordinance No. 101 (Courts), and the particular sub-sections of that section which are relevant to the present matter read as follows:—

(1) Applications that an advocate and solicitor may be suspended from practice, or that he may be struck off the rolls, shall be by motion for an order calling upon the advocate and solicitor to show cause.

(3) A copy of the affidavit upon which the order was granted shall be served with the order upon the advocate and solicitor named in the order.

(4) If the advocate and solicitor named in the order is or is believed to be within the Colony, the provisions of the Civil Procedure Code for service of writs of summons shall apply to the service of the order.

(5) If the advocate and solicitor is not within the Colony, the Court may give such directions for the service of the order, or for notice thereof, as it thinks fit, or may proceed to make the order absolute *ex parte.*

(6) Any order absolute, made in cases where personal service of the order to show cause has not been effected, may be set aside on the application of the advocate and solicitor, on good cause being shown.

And section 390(1) of the Civil Procedure Code provided:—

"Except where, according to the practice, on the first day of April, 1908, any order or rule might be made absolute *ex parte* in the first instance, and except in the case mentioned in section 92 of Ordinance No. 101 (Courts), no motion shall be made without previous notice to the parties affected thereby."

Under the law as it stood prior to the 1st January, 1935, applications under section 92 of the Courts [192] Ordinance for an order to show cause [192] were always made *ex parte,* and it is not now questioned that that procedure was correct.

As from the 1st January, 1935, however, Ordinance No. 101 (Courts) and the Civil Procedure Code have been repealed, and provisions corresponding to those quoted above are now to be found, respectively, in section 26 of the Advocates and Solicitors Ordinance, 1934, and in Order XLIX, rule 4, of the Rules of the Supreme Court, 1934.

Section 26 of the Advocates and Solicitors Ordinance reproduces almost in identical words the relevant provisions of section 92 of the old Courts Ordinance, but Order XLIX, rule 4 (so far as it is material), reads as follows:—

"Except where, according to the practice heretofore existing, any order or rule might be made absolute *ex parte* in the first instance, or where any law in force for the time being otherwise prescribes, no motion shall be made without previous notice to the parties affected thereby."

Comparing this rule with section 390(1) of the old Civil Procedure Code it will be seen that the words "except in the case mentioned in section 92 of Ordinance No. 101 (Courts)" have now been replaced by the words "except where any law in force for the time being otherwise prescribes." It was argued on behalf of the respondents that this alteration in the law has effected an important change in the procedure to be followed on applications of this nature, and that, as section 26 of the Advocates and Solicitors Ordinance does not specifically state that applications for an order to show cause are to be made *ex parte,* such applications do not fall within Order XLIX, rule 4, and therefore can only be made on notice to the advocate and solicitor affected. This argument, however, is based on the assumption that it was by virtue of the provisions of section 390(1) of the Civil Procedure Code that applications under section 92 of the Courts Ordinance were dealt with *ex parte;* in other words, that an exception to the general rule that notice of motions must be given was *created* by the Civil Procedure Code. In the opinion of the Court this is an incorrect assumption. We consider that the correct view is that it was under the terms of section 92 of the Courts Ordinance itself that such applications were made *ex parte,* and that the reference in section 390(1) of the Civil Procedure Code to the case mentioned in section 92 of the Courts Ordinance was inserted to avoid a conflict arising between those two sections. If this is the correct view then it is clear that the altered phraseology of Order XLIX, rule 4, which has been mentioned above does not affect the position. All that the new rule does is to extend the reference, which was formerly limited to the case mentioned in section 92 of the Courts Ordinance, to any other cases which the law might prescribe.

The question, therefore, whether these applications are to be made *ex parte* depends on the terms of the section dealing with such applications, namely, section 26 of the Advocates and Solicitors Ordinance, and when we find that the material provisions of section 92 of the old Courts Ordinance have there been re-enacted in identical language it is a necessary inference that the legislature did not intend to alter the existing procedure.

In the opinion of the Court the language used in both section 92 of the old Courts Ordinance and section 26 of the present Advocates and Solicitors Ordinance leaves no room for doubt that the intention was that applications of this kind should be made *ex parte.* That procedure has always been followed in the past and in our view it is still the correct procedure.

It is not without significance that a similar view as to the procedure appears to have been at one time held by Messrs. Chan & Eber who represent one of the respondents in these proceedings, because in their letter to the Solicitor-General dated the 5th March, 1935, the following passage occurs:—

"In the event of a motion being filed as indicated in your letter, our client will have no *locus standi* in the proceedings until he is served with the order to show cause, and until then he is advised to take no part whatever in the proceedings but to reserve all his rights therein."

In our view the procedure adopted by the Attorney-General in the present case was correct, and the first ground on which the respondents seek to have the order of the 8th April set aside therefore fails.

The second ground upon which the respondents rely is that the order in question was founded upon affidavits not actually made before the order was applied for and read or used without leave of the Court or a Judge. The respondents' contention is based on the terms of Order 36, rule 19, of the Rules of the Supreme Court, which reads as follows:—

"Except by leave of the Court or a Judge no order made *ex parte* in Court or in Chambers founded on any affidavit, other than an affidavit to prove service of a document, shall be of any force, unless the affidavit, on which the application was made, was actually made before the order [193] was [193] applied for and filed at the time of making the motion."

It is contended that, under the terms of this rule, an order made *ex parte* is without force or effect if, without the leave of the Court or a Judge, any affidavit (other than an affidavit to prove service of a document) is read or used at the hearing of the motion which had not been actually made before the filing of the motion and filed at the time of making the motion. In the present case the motion was filed on the 6th March, 1935, and two supporting affidavits were filed at the same time, but before the motion was heard on the 8th April several further affidavits were made and filed and were read and used, without express leave, at the hearing of the motion. The respondents contend that the reading and using of these further affidavits renders the order of no force or effect.

The rule in question is not easy to interpret and there is little, if any, judicial authority available upon it, but in the view of the Court the interpretation sought to be placed upon it by the respondents is much

too wide. If the rule had been intended to refer to every affidavit read on an *ex parte* application the rule would no doubt have been framed in general terms, but what the rule says is:—

"unless the affidavit, on which the application was made, was actually made, etc."

In the opinion of the Court this can only mean the main affidavit setting out the facts upon which the *ex parte* order is applied for. The object of the rule appears to be to prevent, except with leave, the filing of a motion for an *ex parte* order unless a proper supporting affidavit has already been made; but if a proper affidavit has been made in support of the application for an *ex parte* order there would seem to be no objection in principle or otherwise to further supplementary affidavits being made and filed prior to the hearing of the motion.

Order 36, rule 19, is to all intents and purposes similar to English Order 38, rule 19, and the practice of the Courts in England would appear to be in accordance with the interpretation suggested above. The case of *In re King & Co.'s Trade-Mark,* [1892] 2 Ch. p. 462 was a case of an *ex parte* motion to expunge a trade mark from the Register. The original affidavit upon which the application was made was filed on the 9th March, 1892. The motion came on for hearing on the 18th March and further affidavits dated the 17th and 18th March were read and referred to in the order. On an application to set aside the order objection was made that the affidavit of the 18th March had not actually been filed when the order was made, although it was filed later on the same day. This objection was overruled, but it is noticeable that no objection was taken that the affidavits of the 17th and 18th March had been read at all on the hearing of the motion. If the contention of the respondents is correct the reading of these affidavits would have invalidated the order. Apart from this, so far as the Court is aware, the Courts in England have always exercised their discretion in allowing affidavits to be read when they have been filed even at the last moment, and this is stated to be the practice in the latest edition of *Kerr* on Receivers, 6th edn., p. 639.

In the present case, therefore, inasmuch as affidavits setting forth the facts upon which an *ex parte* order was sought were filed at the same time as the motion itself, the respondents' objection to the reading and using of further affidavits made and filed after that date but before the date of hearing is, in the opinion of the Court, without substance and must fail.

A third ground for setting aside the order of the 8th April has been put forward by two of the three respondents to these proceedings, namely, that in obtaining that order the Solicitor-General did not observe the utmost good faith in that he misrepresented to the Court what had been stated on behalf of one of the respondents (who has been referred to in these proceedings as Mr. *A.*) in a letter of explanation addressed by Messrs. Drew & Napier to the Solicitor-General.

It is, of course, well established that where an *ex parte* application is made to a Court the utmost good faith must be observed, otherwise the order may be discharged at the instance of the person against whom it is made. There must be no misrepresentation or suppression of material facts. As Kekewich J. said in *Boyce* v. *Gill,* 64 L.T. at p. 875 :—

"It is of the utmost importance that the Court should be able to rely upon the statement of counsel, and the affidavits. It is of the utmost importance that there should be a full disclosure of the facts."

In the present case the learned Solicitor-General stated to the Court that:—

"one gentleman" (meaning Mr. *A.*) "said the civil proceedings were never mentioned at all."

This is alleged to be a misrepresentation of what was stated in Messrs. Drew & Napier's letter to the Solicitor-General, dated the 21st February, 1935, which contains the following passage:—

"The question of the parties' intentions with regard to the civil proceedings formed no part of the grounds suggested [194] by our client for the withdrawal of the forging case either in the interview of the 1st May or in our client's letter of the 2nd May confirming what had taken place. Our client has no recollection that the continuance of the civil proceedings was put before the learned Deputy Public Prosecutor during the interview as a ground for the withdrawal of the criminal proceedings." [194]

It is now stated that this passage was not intended to amount to a definite statement on behalf of Mr. *A.* that the civil proceedings had never been mentioned to the Deputy Public Prosecutor, but it is, in the view of the Court, at least open to that interpretation. That being so, in the opinion of the Court the charge against the Solicitor-General of having neglected to observe the utmost good faith towards the Court on this point entirely fails. The Solicitor-General's statement which has been complained of amounted to nothing more than a comment on the letter in question. Whether or not that comment was a correct representation of what the letter contained appears to us to be immaterial inasmuch as the Court had the letter before it and was in a position to form its own opinion as to its meaning.

One further ground of objection to the order of the 8th April has been taken on behalf of Mr. *A.* alone, namely, that the learned Solicitor-General failed to observe the utmost good faith in that he led the Court to believe that a certain letter written by Mr. *A.'s* firm had been written by Mr. *A.* himself, whereas in fact Mr. *A.* was not in the Colony when the letter in question was written. Having heard the learned Solicitor-General on this point the Court is satisfied that the statement attributed to him was made in the genuine belief that the letter in question was (as all the other letters had been) written by Mr. *A.* and that there was no intention whatever to mislead the Court. In any event it would seem to be sufficient to dispose of this objection to say that in making the *ex parte* order of the 8th April the minds of the members of the Court were not affected in the least degree by the contents of this letter.

For the reasons which have been given the judgment of the Court is that these motions fail and must be dismissed.

Motion dismissed.

Solicitors: *Drew & Napier; Chan & Eber; Rodyk & Davidson.*